IN THE HIGH COURT OF JUDICATAURE FOR RAJASTHAN AT

JODHPUR.

JUDGMENT.

M/s Ram Pratap Kewalchand vs. Smt.Dhayali @ Dhapu & ors.

S.B.Civil Misc.Appeal No.493/94 against the order dated 3.3.1994 passed by the learned Addl. District Judge No.2, Jodhpur in Civil Original Suit No.13/79.

Date of Judgment: October 18, 2006.

PRESENT.
HON'BLE MR. PRAKASH TATIA, J.

Mr. C.S. Kotwani for the appellant.
Mr. G.R. Gora for the respondent.

BY THE COURT:

Heard learned counsel for the parties.

The present appeal is against the order of the trial court dated 3.3.1994 by which the trial court dismissed the appellant's application filed under Order 22 Rule 4, C.P.C. and consequently, dismissed the suit of the appellant-plaintiff as abated.

Brief facts of the case are that the suit for return of one tractor or in lieu of that, money decree of Rs.53,500/-, was filed by the plaintiff in the court of District Judge, Jodhpur on 15.12.1981 which was transferred to the court of Addl. District Judge No.2, Jodhpur. The summons were served upon the defendant and trial was going on. The

case was fixed for the evidence of the plaintiff and on 1.8.1989, no body appeared on behalf of the plaintiff, therefore, the suit was dismissed in default by order dated 1.8.1989. The suit was restored when the plaintiff submitted application No.45B/89 and the case was again registered on 7.12.1992. Again summons were issued to the defendant several times by ordinary course. No summon came back except the summon dated 4.12.1993 for the date 12.12.1993. This summon also did not receive by the court by 18.12.1993. On 7.1.1994, it was recorded in the order-sheet that the report received on the summon of the defendant that he has died. The plaintiff sought time to take steps and submitted application under Order 22 Rule 4, CP.C. on the next date on 15.1.1994. The plaintiff submitted that he came to know about the death of defendant only from the report on summon issued for the date 18.12.1993 and which was noticed by the court on 7.1.1994. The notices were issued to the legal representatives of the sole defendant. The legal representatives of the defendant submitted reply to the application filed under Order 22 Rule 4, C.P.C. stating therein that in fact the defendant died on 15.3.1992 and no steps have been taken by the plaintiff for impleading the legal representatives of the defendant for such a long period, therefore, the plaintiff's application filed under Order 22 Rule 4, C.P.C. may be dismissed.

It will be worthwhile to mention here that the plaintiff submitted

additional affidavit stating therein that he came to know about the death of defendant only from the report over the summon and otherwise he has no knowledge about the death of the defendant. Despite this additional affidavit, the defendant's legal representative's only contention was that the application has been filed after delay.

The trial court observed that the plaintiff has not submitted any application under Section 5 of the Limitation Act for condoning the delay nor submitted application under Order 22 Rule 9, therefore, the delay cannot be condoned and the legal representatives of the defendant cannot be taken on record.

The learned counsel for the appellant submits that the appellant had no knowledge about the death of the sole defendant and he came to know about the death of the defendant only when the report received by the court on summon sent for the service of the defendant and when this fact came in the knowledge of the appellant-plaintiff, he within eight days, submitted application under Order 22 Rule 4, C.P.C. It is submitted that the reasons given in the application constitute sufficient cause for setting aside of the abatement as well as for condonation of delay and, therefore, the court could have condoned the delay and could have set aside the abatement of the suit on finding sufficient cause from the application filed under Order 22 Rule 4, C.P.C. The learned counsel for the appellant relied upon the judgment of the

Hon'ble Apex Court delivered in the case of Mithalal Dalsangar Singh vs. Annabai Devram Kini and others ((2003) 10 SCC 691).

The learned counsel for the respondent submitted that the appellant is also resident of the same village and, therefore, he had knowledge of the death of the sole defendant still did not submit the application for two years. In view of the above fact, the court below was right in dismissing the application filed under Order 22 Rule 4, C.P.C.. The learned counsel for the respondent relied upon the judgment of the Patna High Court delivered in the case of Minati Dutta and others v. Sushil Chaudhary (AIR 2006 Patna 62) as well as the judgment of this Court (by me) delivered in the case of National Insurance Co. Ltd. v. Shakila & ors. (2001 WLC(Raj.) 750).

I considered the submissions of the learned counsel for the parties and perused the record also.

The facts are not in dispute. The sole defendant died on 15.3.1992.The report received on the summon of the sole defendant that the sole defendant has died. This report was noticed by the court on 7.1.1994. The plaintiff in 8 days only submitted application under Order 22 Rule 4, C.P.C. on 15.1.1994. The contention of the plaintiff-appellant is that he had no knowledge of the death of the sole defendant. He also submitted additional affidavit stating therein that the plaintiff came to know about the death of the defendant only from

the report of the summon and otherwise he had no knowledge. This fact has not been controverted by the defendant's legal representatives in reply to the application filed by the plaintiff nor by filing the affidavit. There is no material available on record by which it can be presumed that the plaintiff had knowledge of the death of the defendant since the death of the defendant i.e. from 15.3.1992 or he came to know about the death of the defendant on subsequent thereof but before 7.1.1994. It appears that the plaintiff submitted the summon for the service upon the defendant on several occasions and which were issued by the court and they did not return back. The only summon returned back was noticed by the court on 7.1.1994, which made the plaintiff aware about the death of the defendant. In view of the above facts, the plaintiff submitted application for bringing on record the legal representatives of the defendant within 8 days of the date of his knowledge about the death of the defendant.

Hon'ble the Supreme Court in the case of Mithalal Dalsangar Singh (supra) held that simple prayer for bringing the legal representatives on record without specifically praying for setting aside of the abatement, may in substance, be construed a prayer for setting abatement. In view of the above, the court below committed error of law in observing that the plaintiff has not submitted application for condoning the delay or has not prayed for setting aside of the abatement. The plaintiff has

disclosed the cause for not moving application in time and prayed for impleading the legal representatives of the defendant in the suit which impliedly means impleading of the legal representatives of the defendant after setting aside of the abatement of the suit.

From the judgment relied upon by the learned counsel for the respondent delivered in the case of National Insurance Co. Ltd. v. Shakila & ors.(supra), it is clear that the application for bringing the legal representatives of deceased was made after seven years without explaining the cause for delay and on that factual matrix, this Court declared the appeal abated. The said judgment has no application to the facts of the present case.

In the case of Minati Dutta and others(supra), no application under Order 22 Rule 4, C.P.C. was submitted and application under Order 1 Rule 10,C.P.C. was submitted for bringing on record the legal representatives. That application was also not supported by application under Section 5 of the Limitation Act and there was no explanation for not filing the application in time, therefore, the above judgment also has no application to the facts of the case.

In view of the above, the appeal deserves to be allowed and hence allowed. The order of the trial court dated 3.3.1994 is set aside and the abatement of the suit is set aside . The application filed by the appellant under Order 22 Rule 4, C.P.C. is allowed. The legal

representatives of the defendant are taken on record. Both the parties are directed to remain present before the court below on 27.11.2006. The record of the court below be sent forthwith.

(PRAKASH TATIA),J.

mlt.